(24,360)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 616.

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1914.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States District Court, Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The Thames and Mersey Marine Insurance Company, Limited, Petitioner, and the United States of America, Defendant wherein is involved the construction and application of the Constitution of the United States a manifest error hath happened, to the great damage of the said petitioner, The Thames and Mersey Marine Insurance Company, Limited, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20th day of August, in the year of our Lord one thousand nine hundred and fourteen.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States, Southern District of New York.

Allowed by—

VAN VECHTEN VEEDER,
Judge of the District Court of the United States, Southern District of New York.

[Endorsed:] L. 12/239. L. 12–239. United States Dist. Ct., South. Dist., N. Y. The Thames & Mersey Marine Ins. Co., L't'd, v. United States of America. Writ of Error. Haight, Sandford & Smith, Att'ys for Petitioner. Filed U. S. District Court, S. D. of N. Y., Aug. 21, 1914.

2 United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,
against
UNITED STATES OF AMERICA.

Amended Petition.

To the Judges of the United States District Court for the Southern District of New York:

The Thames & Mersey Marine Insurance Company, Limited, brings this, its petition, against the United States of America, and respectfully shows to this Court as follows:

First. Your petitioner, The Thames & Mersey Marine Insurance Company, Limited, is and was a corporation engaged in the business of underwriting policies of marine insurance in the City of New York, within the District aforesaid, between the first day of July, 1898, and the first day of July, 1901. Its principal office for conducting said business in the United States and its residence was and is in the Borough of Manhattan, City of New York, in said District.

Second. During the said period there was levied by the United States of America and petitioner was assessed an internal revenue tax amounting in all to about Five thousand five hundred dollars ($5,500) on policies of marine insurance, underwritten by it, whereby it insured against marine risks certain products and merchandise which were exported from the United States to foreign countries, which amount it afterwards, at various times during the period mentioned, paid to and it was collected by Charles H. Treat, Collector of Internal Revenue of the United States for the Second District of New York.

3 Third. The said policies were issued in manner and form as follows: Open policies were drawn up and executed by the petitioner and delivered to the insured which contained in substance an agreement that petitioner would insure all cargoes of goods which the shipper, the insured, should ship in the foreign trade during the life of said policies respectively, and that the shipper would insure all such cargoes with the petitioner and would from time to time pay the premiums thereon according to the regular rates for the particular voyage upon which each cargo was to be shipped.

Fourth. From time to time the petitioner caused to be delivered to the insured declarations in printed form, a specimen of which in the usual form is annexed hereto and marked Exhibit A. When the shipper had a cargo of goods ready for export and designated and set apart from all other goods for shipment on a particular ship, he filled up the blanks in this declaration in accordance with the facts of each case and delivered the same to petitioner at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration was not delivered to petitioner until after the vessel had sailed. Upon receiving each of said declarations

petitioner entered thereon the amount and rate of the premium on the particular cargo mentioned therein.

Fifth. The petitioner issued and delivered to the shipper a certificate executed by it that the goods mentioned in each declaration were insured for the voyage and upon the vessel mentioned therein. Said certificate expressed that it was not to be effective until countersigned by the shipper. A specimen of such certificate in the usual form is annexed and marked Exhibit B. Your petitioner is informed and believes that bills of exchange were drawn by the exporters against the respective consignees of said products and merchandise for the price thereof and that the bills of lading for said products and merchandise, so exported as aforesaid, and the
4 said certificates of insurance were required, by custom and usage, as documents necessary to enable the said export to be made and the said bills of exchange to be discounted and were actually forwarded to the foreign country to which each such export was made.

Sixth. At the end of each month during the period aforesaid, petitioner rendered to the insured a bill for the premiums of insurance which had accrued during said month in accordance with the said declarations, which bill was paid by the insured. And at the end of each month petitioner presented to said Collector a book containing a summary of the premiums earned by it during said month, in respect of such insurance. Your petitioner then purchased from said Collector documentary stamps of the amount required by said Act to be used and cancelled in respect of such insurance. These were by direction of said Collector severally affixed by petitioner to the book kept for that purpose in reference to the tax upon said policies and were then duly cancelled by petitioner. The Commissioner of Internal Revenue was authorized by said Act to prescribe such method for the cancellation of said stamps as a substitute for the method provided in the Act as he might deem expedient. He did for the mutual convenience of the office of Internal Revenue and of petitioner, prescribe said method actually adopted by petitioner as aforesaid.

Seventh. The said documentary stamps were required by the said Collector to be affixed and cancelled as aforesaid. Each of said policies, declarations and certificates, by its terms, provided for the insurance of the said products and merchandise so exported as aforesaid during its transit by sea from the United States to foreign ports. Said products and merchandise actually were exported from ports in the United States to foreign ports.

5 Eighth. Said requirement of the said Collector was made in pursuance of Section 29 of the War Revenue Act of Congress of the United States, which was approved June 13, 1898, by which said Act it was enacted that on every policy of marine insurance there should be levied, collected and paid upon the amount of premium charged, one-half of one per cent upon each dollar or fractional part thereof. Said Act further enacted that an adhesive stamp, denoting said tax, should be affixed to each policy and cancelled or that the method prescribed as a substitute therefor, as afore-

said, should be followed. The amount levied and paid as aforesaid was computed upon the said basis of the premiums charged upon said policies.

Ninth. The said requirements of the said War Revenue Act were in violation of the ninth section of the First Article of the Constitution of the United States, which provides: "No tax or duty shall be laid on articles exported from any state." The said revenue stamps so affixed were a tax upon the export of the goods exported in the said vessels. The failure to comply with said Act in reference to the payment of said tax upon the said policies of marine insurance was declared by said Act to be a misdemeanor and the parties to said policies of insurance were liable to punishment by fine for failure to affix said stamps or otherwise comply with the direction of the Commissioner of Internal Revenue in that regard. Said policies not being stamped according to law were declared by said Act to be invalid and of no effect.

Tenth. On the 27th day of July, 1912, an Act was passed by the Congress of the United States and approved by the President, which enacted as follows:

6 "An Act Extending the time for the repayment of certain war-revenue taxes erroneously collected."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of the moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

Eleventh. In accordance with the provisions of the said last mentioned Act, your petitioner did present its claim for the refunding of said tax so as aforesaid illegally assessed and collected, to the Commissioner of Internal Revenue on or about the 22nd day of December, 1913, and the said Commissioner of Internal Revenue thereupon directed that said claim should be filed with the collector to whom the taxes were paid; and your petitioner was instructed that he would enter the same on his record and cause examination to be made and certify the same to the office of the Commissioner of Internal Revenue for consideration. Your petitioner is informed and believes that he did, in accordance with the rules of the Commissioner of Internal Revenue and his direction, transmit the same

to said Commissioner. The Commissioner of Internal Revenue, as your petitioner is informed and believes, refused to approve the said claim, or to present the same to the Secretary of the Treasury for payment, on the ground that the provisions of the last mentioned Act applied solely to taxes collected upon legacies under Section 29 of the Act of June 13, 1898. And further for the reason that
7 the said Commissioner claimed that the taxes imposed on policies of marine insurance were not illegally collected.

Wherefore your petitioner demands judgment against the United States of America for Five thousand five hundred dollars ($5,500) and that the Secretary of the Treasury thereof be directed, by the judgment of this Court, to pay out of any moneys of the United States not otherwise appropriated, to the petitioner, the said sum paid by it or its account to the United States under the provisions of Section 29 of the Act of Congress approved June 13, 1898, known as the War Revenue Act as aforesaid, and that your petitioner may have such other relief as may be just, together with the costs of this Court.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

EVERETT P. WHEELER,
Of Counsel.

8 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

H. K. Fowler, being duly sworn, deposes and says: I am agent for the petitioner herein. I have read the foregoing amended petition and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

H. K. FOWLER.

Sworn to before me, this 26th day of June, 1914.
[SEAL.] HARRY M. HEWITT,
Notary Public, N. Y. Co.

9 EXHIBIT A.

The Thames & Mersey Marine Insurance Company, Limited.

United States Branch, 82-92 Beaver Street, New York.

Date ——, —.

Enter on open policy of —— ——, No. —, $— at — per cent — On — Conditions — Per — Sailing— At and from—— To —— Bill of Lading dated —.

—— ——, *Applicant.*
—— ——, *Approved.*

Warranted by the assured that the loading of vessels with Grain, Petroleum and heavy cargoes shall be made in accordance with the rules of the National Board of Marine Underwriters on such cargoes, and that a certificate of an inspector appointed by the Board of Underwriters shall be obtained before the sailing of such vessels.

Risks covered by vessels carrying in excess of their net register tonnage of Grain in bulk, or in bulk and/or bags, held covered at an extra premium to be arranged.

Memo. for the Company.

$— @ — per cent.

Cards .....
Dealers' Book .....
H/O. .....
Cert. No. .....
Payable at .....

[On right margin:] To be approved if in accordance with the terms of the policy.

10 EXHIBIT B.

Certificate of Insurance.

$—. No. 403, A. H. Co.

The Thames & Mersey Marine Insurance Company, Limited.

Liverpool and London Chambers, Liverpool.

H. K. Fowler, Agent and Attorney, 82-92 Beaver Street, New York

NEW YORK, ——, —.

This is to Certify, that on the — this Company insured under Policy No. 1249, for The American Hay Company, — Dollars, on — valued at — shipped on board of the — at and from —— and it is hereby understood and agreed that in case of loss such loss is payable to the order of The American Hay Company, at — on surrender of this Certificate.

This Certificate represents and takes the place of the Policy, and conveys all the rights of the Original Policy Holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special Policy direct to the holder of the Certificate, and free from any liability for unpaid premiums. This Certificate is not valid unless countersigned by The American Hay Company.

H. K. FOWLER, *Agent.*

Marks and Numbers.

Clauses.

Warranted free from Particular Average, unless the vessel or craft be stranded, sunk, burnt or in collision.

Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, or the consequences of any attempt thereat, whether lawful or unlawful; and whether by the act of any belligerent nations or by governments of seceding or revolting States, or by unauthorized or lawless persons, therein, or otherwise; and whether occurring in a port of distress or otherwise; anything in this Policy to the contrary notwithstanding. Also, warranted not to abandon in case of blockade, and free from any expense in consequence thereof; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Held covered in case of deviation or change of voyage, provided notice be given and any additional premium required be agreed immediately after receipt of advices.

Including risk of craft to and from the vessel; each lighter or craft to be considered as if separately insured.

It is Hereby Agreed that any loss or claim under this Certificate shall be paid in Sterling, at the Office of the Company, in Liverpool, at the rate of Four Dollars and Ninety-Five Cents ($4.95/100) Gold, to the Pound Sterling.

On goods destined for ports and places on the Continent of Europe, any loss or claim hereunder may, however, if so agreed at the time of issue of this Certificate, be payable by one of the Company's settling Agents named at back hereof, and at the rate of exchange set opposite his name.

It is Hereby Understood and Agreed that in case of loss or damage happening to the property insured under this Certificate, the same shall be reported as soon as the goods are landed, or the loss is known or expected, to the Company at their Office, Liverpool and London Chambers, Liverpool, England, or if the port of destination be, or the damaged goods arrive at, ports on the Continent of Europe, it is agreed that any loss or damage shall be promptly reported for attention to the nearest located Agent of the Company. (See list of all such Agents printed on the back of this Certificate.)

Shipments to London.—In case of loss or damage the holders of this certificate are also requested to communicate immediately with Messrs. E. L. Johnson's Sons & Mowat, Lloyd's, London, E. C.

Claims to be adjusted according to the usages of Lloyds but subject to the conditions of the Policy and Contract of Insurance.

NOTICE.—To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate it must be stamped within ten days after its receipt in the United Kingdom.

[Stamped across face:] Specimen. Specimen. Specimen. Specimen.

11 *Agents and Bankers of the Thames & Mersey Marine Insurance Co., Limited, on the Continent of Europe.*

Agents.	Bankers.	Rates of Exchange.
Amsterdam, J. H. Schröder	Banque de Paris, et des Pays bas	5.06¼ Francs per Dollar.
Antwerp, Leon Van Peborgh	Compagnie Commerciale Belge.	do.
Bremen, Carl Graef		Ninety-eight (98) cents per four (4) Marks.
Bordeaux, James Moss & Co.	James Moss & Co.	5.06¼ Francs per Dollar.
Dunkirk, Albert Mine		
Genoa, Evan MacKenzie	Evan MacKenzie.	do.
Hamburg, Bleichröder & Co.	Bleichröder & Co.	Ninety-eight (98) cents per four (4) Marks.
Havre, Frederick Wood	Neuflize & Cie., Paris.	5.06¼ Francs per Dollar.
Marseilles, Gaubert & Spies	Rubaud Frères,	do.
Paris, L. Degoix	Neuflize & Cie.,	do.
Rotterdam, John Hudig & Son	Bank of Rotterdam,	Forty-two (42) cents per Florin.
Trieste, Edgar H. Greenham	Neuflize & Cie., Paris.	5.06¼ Francs per Dollar.

12 (Endorsed:) A copy of the within paper has been this day received at this office, June 30, 1914. H. Snowden Marshall, U. S. Attorney.—U. S. District Court, S. D. of N. Y. Filed Jun- 30, 1914.

13 *Demurrer.*

United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LTD.,
vs.
UNITED STATES OF AMERICA.

The United States of America, defendant above named, by H. Snowden Marshall, United States Attorney for the Southern District of New York, its attorney, appearing herein specially and not submitting itself to the jurisdiction of this court, demurs to the amended petition herein on the ground that it appears on the face thereof that the Court has no jurisdiction of this defendant, and also on the further ground that it appears upon the face thereof that the Court has no jurisdiction of the subject of the action, and also on the further ground that the petition does not state facts sufficient to constitute a cause of action.

Dated: New York, July 2, 1914.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York, Attorney for Defendant.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law and is not interposed for the purpose of delay.

H. SNOWDEN MARSHALL,
United States Attorney.

(Endorsed:) A copy received. Jul- 2, 1914. Haight, Sandford & Smith.—U. S. District Court, S. D. of N. Y. Filed Jul- 2, 1914.

14 *Opinion.*

United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LTD.,
against
UNITED STATES OF AMERICA.

HAND, *D. J.:*

The petitioner has now amended so as to show the following facts: A general marine policy is issued covering successive shipments. When a cargo is aboard the assured goes to the underwriter with a "declaration," so-called, which shows the cargo and its value

which is to be covered on the intended voyage. Upon delivery of this the underwriter issues a certificate to cover and the assured sends this along with the bill of lading, draft, etc. to the foreign country.

The contention as I understand it is that insurance upon goods actually in transit is different from insurance upon goods intended for transit, because a tax upon the first class of goods is within the prohibition while a tax upon the second is not. I intended no such distinction, and did not before presuppose that the goods insured had not started upon their transit. Indeed, that question was not raised, as I recall, in the first case. Whether it was or not, the point of the decision in my judgment is, not that the contract of insurance does not touch exports, but that it is not a part of their exportation. That is to say, its performance does not involve any part of the transit, nor does it, like a manifest, record the transit.

It may be that if the goods insured are not yet exports there
15 is a double reason, but the second reason was not what I had in mind.

I said in the other opinion that none of the insurance cases concerned only insurance on goods in transit. In this I was wrong. Hooper v. California, 155 U. S. 648, dealt with a tax upon the business of marine insurance in San Francisco. Some of the marine insurance written in that city is, I suppose, upon coastwise trade to Eureka on the north and Santa Cruz and San Diego on the south, but the immense mass of it must be either to foreign ports or to Oregon and Washington. In any event no such distinction was taken, but the case went squarely upon the theory that taking insurance upon foreign or interstate trade was not itself foreign or interstate business. The prohibition against taxing exports has been treated as analogous to the prohibition on the states against regulating interstate trade. It is not perhaps necessary to say whether the cases are precisely the same; it is enough that the reasoning in Hooper v. California, supra, presupposes, without expressly deciding, that it is the same, and that if the business was interstate the tax was void; certainly at that time that was the accepted doctrine. I need not consider whether there is to-day a zone in which the state may act till Congress intervene, and whether a state might not tax a business which Congress could regulate. Hooper v. California, supra, seems to me directly to support the defendant. July 16, 1914.

L. H., *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jul- 16, 1914.

16 *Order Dismissing Complaint.*

At a Stated Term of the District Court of the United States of America within and for the Southern District of New York, Held at the United States Courts and Post-Office Building, Borough of Manhattan, City of New York, on the 3rd Day of August, in the Year Nineteen Hundred and Fourteen.

Present: Hon. William I. Grubb, District Judge.

L. 12/239.

THAMES & MERSEY MARINE INSURANCE CO., LTD.,
against
UNITED STATES OF AMERICA.

A demurrer having been filed by the United States of America to the amended petition herein, and the same having been duly brought on for argument before me, and after hearing Kenneth M. Spence, Esq., Assistant United States Attorney for the Southern District of New York, of Counsel for the defendant herein, in support of the demurrer, and Everett P. Wheeler, Esq., of Counsel for the petitioner, in opposition thereto.

Now, on motion of H. Snowden Marshall, United States Attorney for the Southern District of New York, attorney for the United States of America, it is

Ordered that the said demurrer be, and the same hereby is, sustained, with leave to the petitioner to file an amended petition within ten days from the date hereof, and it is

Further ordered that if the petitioner fails to file an amended petition herein within ten days from the date herein, then judgment shall be entered for the defendant, dismissing the petition with costs.

Dated: Aug. 3, 1914.

W. I. GRUBB, *U. S. D. J.*

U. S. District Court, S. D. of N. Y. Consented to as to form. Haight, Sandford & Smith, Attorneys for Petitioners. Filed Aug. 4, 1914.

17 *Judgment.*

United States District Court, Southern District of New York.

L. 12/239.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,
Petitioner,
vs.
THE UNITED STATES OF AMERICA.

The demurrer of the United States of America, to the amended petition herein, having come on for argument, and an order having

been duly filed on August 3, 1914, wherein it was ordered that the demurrer be and the same hereby is sustained, with leave to the petitioner to file an amended petition within ten days thereof, and further ordering that if the petitioner fails to file an amended petition herein within ten days, then judgment shall be entered for the defendant dismissing the petition with costs, and the petitioner having failed to serve or file an amended petition, and the costs having been taxed at the sum of Seventeen & 70/100 ($17.70) Dollars, it is

Ordered that the amended petition be dismissed, and that the United States have judgment against the petitioner, The Thames & Mersey Marine Insurance Company, Limited, for the sum of Seventeen & 70/100 Dollars, costs, as taxed, and that execution issue therefor.

Judgment signed this 18 day of August, 1914.

ALEX. GILCHRIST, JR., *Clerk.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 18, 1914. 4 P. M.

18 United States District Court, Southern District of New York.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED,
against
UNITED STATES OF AMERICA.

Petition for Writ of Error.

Now come Haight, Sandford & Smith, attorneys for the petitioner herein, and say that on the 13th day of August, 1914, this Court entered judgment herein in favor of the defendant and against the petitioner, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated, New York, August 13, 1914.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

EVERETT P. WHEELER,
Of Counsel.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 20, 1914.

19 United States District Court, Southern District of New York.

THAMES & MERSEY MARINE INSURANCE CO., LTD.,
against
UNITED STATES OF AMERICA.

Assignment of Errors.

Now comes the Thames & Mersey Marine Insurance Co., Ltd., complaining herein by Haight, Sandford & Smith, its attorneys, and assigns errors in the decision of the said District Court as follows:

First. Said Court erred in holding that the War Revenue Act of June 13, 1898, in so far as it imposed a tax on policies of marine insurance and the declarations and certificates accompanying the same, covering cargoes exported from ports in the United States to foreign ports, and used in business as documents necessary to enable the said export to be made, did not impose a tax upon the said cargoes and upon their export in violation of the Ninth Section of the First Article of the Constitution of the United States, which provides—

"No tax or duty shall be laid on cargoes exported from any State."

Second. Said Court erred in holding that the petition of the said petitioner did not state facts sufficient to constitute a cause of action.

Third. Said Court erred in entering judgment against the petitioner, and in not entering judgment overruling the de-
20 murrer of the defendant, and requiring it to answer the petition.

Wherefore the petitioner prays that for the errors aforesaid judgment may be reversed.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

EVERETT P. WHEELER,
Of Counsel.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 20, 1914.

21 *Stipulation.*

United States District Court, Southern District of New York.

THAMES & MERSEY MARINE INSURANCE COMPANY, LTD.,
against
THE UNITED STATES.

It is hereby stipulated that the record of the above case shall consist of the amended petition, the demurrer to the same, the opinion, order sustaining the demurrer, the judgment, assignment

of error, petition for writ of error, writ of error, citation and this stipulation.

Dated, New York, August 22nd, 1914.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.

H. SNOWDEN MARSHALL,
U. S. Attorney,
Attorney for The United States.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 22, 1914.

22 UNITED STATES OF AMERICA, *ss:*

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court for the Southern District of New York wherein The Thames and Mersey Marine Insurance Company, Limited, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Van Vechten Veeder, Judge of the District Court of the United States, Southern District of New York, this 20th day of August, in the year of our Lord one thousand nine hundred and fourteen.

VAN VECHTEN VEEDER,
Judge of the District Court of the United States,
Southern District of New York.

23 [Endorsed:] L. 12/239. L. 12–239. U. S. Dist. Ct., South. Dist., N. Y. The Thames & Mersey Marine Ins Co., Ltd., v. United States of America. Citation. Haight, Sandford & Smith, Att'ys for Petitioner. A copy of the within paper has been this day received at this office. Aug. 20, 1914. H. Snowden Marshall, U. S. Attorney. Et gen. U. S. District Court, S. D. of N. Y. Filed Aug. 20, 1914.

24 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED,
Pl'ff in Error,
vs.
UNITED STATES OF AMERICA, Def't in Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York,

do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 1st day of September, in the year of our Lord one thousand nine hundred and Fourteen and of the Independence of the said United States the one hundred and thirty-Ninth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Clerk's fee for certifying record $5.75.

ALEX. GILCHRIST, JR., *Clerk.*

[Endorsed:] United States Supreme Court. The Thames & Mersey Marine Insurance Co., Ltd., Pl'ff in Error, agst. United States of America, Def't in Error. Transcript of Record. Error to the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 24,360. S. New York D. C. U. S. Term No. 616. The Thames and Mersey Marine Insurance Company, Limited, plaintiff in error, vs. The United States. Filed September 4, 1914. File No. 24,360.

Supreme Court of the United States

[illegible]

[illegible]
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PLAINTIFF IN ERROR.

[illegible]
Of Counsel.

INDEX.

Cases Cited.

Supreme Court of the United States,

OCTOBER TERM, 1914.

THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, *against* THE UNITED STATES OF AMERICA.	No. 616.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error brought to review a judgment of the District Court for the Southern District of New York, dismissing the plaintiffs' petition (pp. 12, 13). The opinion is by Judge Learned Hand (pp. 9, 10).

The action was brought under the Tucker Act, re-enacted in the Judicial Code, to recover the amounts paid by the plaintiff to the Collector of Internal Revenue for an internal revenue tax on divers policies of marine insurance, underwritten by plaintiff upon merchandise exported from the United States to foreign countries.

Defendant demurred to the petition. The demurrer was sustained and judgment entered thereon for defendant.

The tax was assessed under the sixth section of the War Revenue Act, 30 Statutes at Large, p. 451.

"On and after July 1, 1898, there shall be levied, collected and paid for and in respect of . . . the several documents, instruments, matters and things mentioned and described in Schedule A . . . the several taxes or sums of money set down in figures against the same respectively . . . in the said schedule."

Schedule A provides as follows (30 Stats. L. at 461):

"Insurance (marine, inland, fire): Each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description (including rents or profits), whether against peril by sea or on inland waters, or by fire or lightning, or other peril, made by any person, association, or corporation, upon the amount of premium charged, one-half of one cent on each dollar, or fractional part thereof; provided that purely co-operative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property and not for profit shall be exempted from the tax herein provided."

Section 13 of the Act (30 Statutes at Large, p. 454), is as follows:

"Sec. 13. That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of this Act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this Act, shall be deemed

guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court, and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect."

The ground of the claim is the unconstitutionality of the tax as a tax on exports, so far as it applies to policies of insurance upon exported goods.

The suit is authorized by the act of Congress approved July 27, 1912, which is pleaded at length in Article Six of the petition (p. 4). The argument on the merits against the claim is that an insurance policy covering goods in transit under an export bill of lading is not a part of the foreign export trade. This brief will be addressed simply to this question, which, in the light of the decisions, may be stated as follows:

Is such an insurance policy an article exported, or a document which, under the usual and recognized methods of business, is essential to carrying on export trade? Was the tax in question a burden on the export trade?

The method of issuing policies of marine insurance is stated in detail in the petition (pp. 2-3, Articles 3-6).

3. Open policies were drawn up and executed by the petitioner and delivered to the insured which contained in substance an agreement that petitioner would insure all cargoes of goods which the shipper, the insured, should ship in the foreign trade during the life of said policies respectively, and that the shipper would insure all such cargoes with the petitioner and would from

time to time pay the premiums thereon according to the regular rates for the particular voyage upon which each cargo was to be shipped.

4. From time to time the petitioner caused to be delivered to the insured declarations in printed form, a specimen of which in the usual form is annexed to the petition and marked Exhibit A, (p. 5). When the shipper had a cargo of goods ready for export and designated and set apart from all other goods for shipment on a particular ship, he filled up the blanks in this declaration in accordance with the facts of each case and delivered the same to petitioner at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration was not delivered to petitioner until after the vessel had sailed. Upon receiving each of said declarations petitioner entered thereon the amount and rate of the premium on the particular cargo mentioned therein.

5. The petitioner issued and delivered to the shipper a certificate executed by it that the goods mentioned in each declaration were insured for the voyage and upon the vessel mentioned therein. Said certificate expressed that it was not to be effective until countersigned by the shipper. A specimen of such certificate in the usual form is annexed to the petition and marked Exhibit B (p. 6). Bills of exchange were drawn by the exporters against the respective consignees of said merchandise for the price thereof and the bills of lading for said products and merchandise, so exported, and the said certificates of insurance were required, by custom and usage, as documents necessary to enable the said export to be made and the said bills of exchange to be dis-

counted, and were actually forwarded to the foreign country to which each such export was made.

6. At the end of each month during the period covered by the open policy, petitioner rendered to the insured a bill for the premiums of insurance which had accrued during said month in accordance with the said declarations, which bill was paid by the insured. And at the end of each month petitioner presented to the Collector of Internal Revenue, a book containing a summary of the premiums earned by it during said month, in respect of such insurance. Petitioner then purchased from said Collector documentary stamps of the amount required by said Act to be used and cancelled in respect of such insurance. These, by direction of the Collector were severally affixed by petitioner to the book kept for that purpose in reference to the tax upon said policies and were then duly cancelled by petitioner.

This method was prescribed by the Commissioner, according to law, as a substitute for that specified in the section before quoted (R. p. 3).

Specifications of Error.

The three errors assigned (R. 13) all come down to one point:

The Court erred in holding that the clause of the War Revenue Act of 1898 which imposed a tax on policies or certificates of marine insurance covering cargoes exported from the United States to foreign ports did not impose a tax upon exports and was not a violation of the Ninth Section of the First Article of the Constitution of the United States.

POINTS.

FIRST.

These policies are articles exported.

The provision of the United States Constitution which controls the case is as follows:

Article I, Section 9, Clause 5.

"NO TAX OR DUTY SHALL BE LAID ON ARTICLES EXPORTED FROM ANY STATE."

The certificates of insurance were required by the custom and usage of business in the export trade (as alleged in the fifth article of petition, p. 3), to accompany, and they did accompany, and formed a part of the business of exporting merchandise. Bills of exchange were drawn by the exporter against the consignee for the price of the goods exported, and the certificates of insurance in question "were required by custom and usage as documents necessary to enable the said export to be made and the said bills of exchange to be discounted and were actually forwarded to the foreign country to which each such export was made" (p. 3).

The policies then were themselves articles exported. They were forwarded to the consignee, and when he paid the drafts became his. They were therefore just as much an export as the goods themselves.

Defendant's answer is that the tax was imposed before the policies became commercial documents. But this overlooks Section 13 of the War Revenue Act already quoted. That imposes a penalty, not for omitting to stamp the policies when the contract of insurance is made, but when the policy is issued, sold or transferred. Then it becomes a commercial document, if issued for the purposes alleged, and then, and not till then, it is taxable under the Statute. The tax was imposed and paid after the goods exported were at sea.

The authorities dispose of this contention adversely to the defendant, as will be shown under the Second Point.

SECOND.

The constitutional prohibition applies when the document taxed is intended to and becomes a part of the business of exporting.

The courts have established the rule that this provision forbids a tax on exports by indirection. If the tax in question throws a burden on the business of exportation as it is carried on under existing and usual forms of business, it is within the prohibition, and none the less so because the tax in form is on the paper on which the document is printed and applies to policies on goods for inland as well as for foreign trade.

These principles are clearly stated in

Fairbank *v.* United States, 181 U. S. 283.

The tax in that case, under this same War Revenue Act was in form laid on "the vellum, parchment or paper" upon which certain instruments should be written, including, among others, bills of lading for any goods to be exported from a port or place in the United States to any foreign port or place. It is evident that goods could be exported without a bill of lading. But, commercially speaking, a bill of lading is necessary, and the court held the tax unconstitutional, on the ground that such a tax was a burden on exportation by reason of the commercial necessity for using a bill of lading, and that it was not made valid by reason of the fact that it applied to all bills of lading.

The following extracts from the opinion illustrate the reasoning of the court:

"The contention on the part of the government is that no tax or duty is placed upon the article exported; that, so far as the question is in respect to what may be exported and how it should be exported, the statute, following the Constitution, imposes no restriction; that the full scope of the legislation is to impose a stamp duty on a document not necessarily, though ordinarily, used in connection with the exportation of goods." (p. 289.)

"It is a restriction on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed." (p. 290).

"By a graduated system, although the tax is called a tax on 'the vellum, parchment, or paper' upon which transactions are written, or by which they are evidenced, a burden may be cast upon exports sufficient to check or retard them, and which will directly conflict with the constitutional provision that no tax or duty shall be laid thereon. The question of power is not to be determined by the amount of the burden attempted to be cast. The Constitutional language is, 'no tax or duty.' (p. 291).

"In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. * * * So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that the national government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax

upon the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export." (pp. 292, 293).

"In like manner, the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance." (p. 295).

"Without enlarging further on these matters, we are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition." (p. 312).

Almy *v.* California, 24 How. 169.

The question was as to whether a stamp tax imposed by a state on bills of lading for interstate shipments amounted to a regulation of interstate commerce beyond the power of the state to make. It was contended that such a tax was not a tax upon the goods themselves. This Court, however, said:

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such com-

merce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported."

These extracts show that to constitute a tax upon exports it is not necessary that the tax should be directly laid upon the article exported, nor that it be laid upon an instrumentality which is absolutely indispensable to the carrying on of the business. The question is a practical one as to what the reguiar channels and methods of such a business are. If such usual methods are taxed, that constitute a tax on such business, and the real test is that already quoted from the Fairbank case, as to whether the tax in question directly burdens exportation.

In New York & Cuba Mail SS. Co. *v.* United States, 125 Fed. 320, the question arose as to a tax on manifests of cargoes exported from the United States. The District Court held, following the Fairbank case, that the tax was unconstitutional, and its ruling was not questioned on appeal. The court said:

"If, therefore, a stamp tax on a bill of lading is a tax upon the property exported, a stamp tax on manifests seems to me to be still more clearly such a tax. * * * I think that the essential character of the stamp tax on manifests was that of a stamp tax on exports in the same sense as a stamp tax on a bill of lading was a tax on exports."

Not only is the above rule established by judicial decisions, but Congress has also acted thereon in ordering the repayment of taxes collected on export bills of exchange.

By the Act of February 1, 1909, Ch. 53, 35 U. S. Stat. L. 590, the Secretary of the Treasury is authorized and directed to pay out of the Treasury to persons or corporations who have duly presented their respective claims "the sums paid for documentary stamps used on foreign bills of exchange drawn between July first, eighteen hundred and ninety-eight, and June thirtieth, nineteen hundred and one, against the value of products or merchandise actually exported to foreign countries, such stamps representing taxes which were *illegally assessed and collected,* said refund to be made whether said stamp taxes were paid under protest or duress or not."

THIRD.

When goods are to be exported a bill of lading is obtained, and the goods described therein are insured. The bill of lading and the policy of insurance accompany the bill of exchange and are a part of the usual commercial documents

which facilitate the export and make it possible on a large scale. This is alleged in Article 5 of the Petition (p. 3) and admitted by the demurer. The authorities are to the same effect.

In Tamvaco *v.* Lucas, 30 L. J. Q. B. 234, 1 Best & Smith 185, it was said by Cockburn, C. J., as long ago as 1861, (p. 197):

"The contract provides for the payment by the buyers on the delivery of the *shipping documents.* By that I understand the ordinary and usual shipping documents, as they are understood in contracts of this nature by members of the mercantile community. *The policy of insurance is undoubtedly one of these.*"

To the same effect is the judgment of Blackburn, J. (p. 206). The Court so held. The judgment was affirmed in Exchcq. Ch. without opinion; 3 Best & Smith 89.

Hickox *v.* Adams, 1876, 34 L. T. N. S. 404.

Mellish, L. J., p. 407:

"In this case there was a contract to sell and deliver goods between a firm carrying on business at New York and a firm at Gloucester. Is the English firm bound to accept bill of lading of the goods without the policy of insurance? I think they are certainly not so bound. It is clear that the goods could not be sold under the bill of lading without security in case of their total loss at sea. Now there was in fact, no policy on this wheat alone, but there was one on the whole quantity consigned to Kruger & Co. I am of the opinion that we must find that Kruger & Co. were not ready and willing to deliver that policy to the defendants; and if Kruger & Co. had been, the plaintiffs would not have been carrying out their contracts with Adams & Co., the defendants, in deliv-

ering to them a policy covering the whole quantity of the wheat."

S. P. Ireland *v.* Livingston, L. R. 5 H. L. 395, 406.

Benjamin on Sales, 5 Ed., §590, p. 705.

The shipper fulfils the obligation of such a contract "when he has put the cargo on board, and forwarded to the purchaser a bill of lading and policy of insurance, with a credit note for freight."

Stroms Bruks &c. *v.* Hutchinson [1905] Appeal Ca. 515, 528.

Mee *v.* McNider, 109 N. Y. 500, shows that this custom of providing a marine policy of insurance as one of the required documents on a sale for export, is recognized on this side of the Atlantic as well as in England.

The Act of Congress approved September 2, 1914 (Public 193), 63rd Congress, confirms this view of the case. Its preamble is as follows:

"Whereas, the foreign commerce of the United States is now greatly impeded and endangered through the absence of adequate facilities for the *insurance* of American vessels and their *cargoes* against the risks of war; and

Whereas, it is deemed necessary and expedient that the United States shall temporarily provide for the export shipping trade of the United States adequate facilities for the insurance of its commerce against the risks of war; Therefore"

A Bureau of War Risk Insurance is established in the Treasury Department which "shall as soon as practicable make provisions for the insurance by the United States of American vessels, their freight and passage moneys and cargoes shipped

or to be shipped therein, against loss or damage by the risks of war." The Executive, through the Treasury Department, has acted accordingly, and accepts application for insurance and issues policies in the form of which copies are annexed (*post*, pp. 20–21).

It is a well-known historical fact of which this Court may take judicial notice, that between the first of August and the second of September, the difficulty of obtaining insurance against war risks almost destroyed the export trade of the United States, and that the passage of this act and the action of the Executive under it, revived that trade, which is steadily increasing.

Here then is a well-considered declaration of Congress, approved by the President and carried into effect by the Executive, which shows that marine insurance is necessary to the export trade. If this be so, it follows that a tax on the policy or other instrument whereby articles exported are insured is a tax on the export thereof, and therefore repugnant to the Constitution and void.

FOURTH.

It was argued for the defendant in error that the issuing of a policy of insurance is not a transaction of commerce, and Paul *v.* Virginia and N. Y. Life Ins. Co. *v.* Deer Lodge Co. are cited in support of this proposition. Those decisions dealt with the right of a State to regulate the business of insurance done within its limits. They are on the border line that is difficult to trace exactly, between federal power and state power. But the distinction is obvious. The insurance agent who

resides in a State and issues policies of marine insurance there is like the shipbuilder who builds a ship. As long as she is on the stocks, she is not subject to Admiralty jurisdiction. The contract to build her is not a maritime contract:

> Peoples Ferry Co. *v.* Beers, 20 How. 393;
> The Antelope, 2 Bened. 405;
> Cunningham *v.* Hall, 1 Cliff. 43.

But when she is launched, she comes at once under the jurisdiction of the federal courts, and the charter-party for the transportation of cargo upon her is not taxable.

> Hvoslef *v.* United States, United States District Court, Southern District of New York, Noyes C. J. (Opinion in No. 331 on this docket.)

When Paul hired his office in Norfolk, advertised for trade, and secured employment from foreign insurance companies, he was doing business which Virginia could regulate. It could require a license fee to be paid by him.

The business of the petitioner here may lawfully be regulated by the State of New York and a license fee imposed for authority to do it. There is nothing in the Constitution to prohibit this, as was held in Paul *v.* Virginia. When in the course of this business it issues a policy covering goods for coastwise shipment, Congress may tax this. But when it issues a policy covering goods for export to foreign countries, this policy at the moment it is issued becomes a document which facilitates exportation. To quote again from the Fairbank case (p. 293):

"If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export."

The Court (p. 291) calls special attention to the fact that under the War Revenue Act the tax is graduated, and that this graduation would enable Congress, if the power to tax at all be sustained, to levy a prohibitory tax and thus defeat the Constitutional prohibition.

In Paul *v.* Virginia the Court cite Nathan *v.* Louisiana, 8 How. 73, in which the validity of a State tax on a broker who dealt solely in foreign bills of exchange was held to be on his business. He is engaged "in supplying an instrument of commerce." In both cases the State law was sustained as a regulation of business done in a State. Whether this business was that of insurance or drawing bills of exchange was not material. On the other hand, in the case at bar the tax is a burden on exportation. It is immaterial whether this is done by a tax on the bill of exchange or on the policy of insurance. It is conceded that the tax on the bill of exchange was for this reason unlawful. By parity of reasoning the tax on the policy is unlawful. Indeed, if there were a distinction it would not sustain the tax on the policy. For there could be exports without bills of exchange. The price could be remitted by cable or in specie. But no bank would advance money on a bill of lading unless the goods were insured. A heavy tax on policies of insurance on exports would destroy the export trade.

In short, when these policies were issued to cover goods which were to be exported, they became at once an instrumentality of export and as such were not taxable.

To use the language of Mr. Justice Brewer, delivering the opinion of the Court in Fairbank *v.* United States, 181 U. S. 283, 291:

"The power to tax is the power to destroy and that power can be exercised, not only by a tax directly on articles exported, but also and equally by a stamp duty on bills of lading evidencing the export."

To this let us add—Also and equally by a stamp duty on policies of insurance securing the export.

FIFTH.

It was argued in the court below that the tax could be sustained on the authority of Cornell *v.* Coyne, 192 U. S. 418, on the ground that the tax was levied without distinction upon policies of marine insurance, whether issued for foreign or domestic commerce, and that it was competent for the Congress to impose a tax upon all properties within the domestic jurisdiction, even though some of it afterwards should be exported. The allegations in the petition, which have been already quoted (*ante,* pp. 3-5), show that the certificate of insurance which closes the contract as to each particular export is not issued until the cargo of goods to be exported has been designated and set apart

from all other goods for shipment upon a particular ship, and that the same was not delivered until the time of the sailing of the vessel or thereafter. For example, it often happens that goods are shipped by a slower ship, because of the rate of freight being less, while the shipping documents are sent by mail by faster ships and reach the consignee before the goods, although not mailed till afterwards. It cannot be said, therefore, that the tax upon these particular certificates of insurance mentioned in the petition is levied while the goods covered by them are part of the general mass of property in this country. Mr. Justice Brewer said in the Cornell case, 192 U. S. 427:

"The true construction of the Constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all properties similarly situated. The exemption attaches to the export and not to the article before its exportation."

In the case at bar the goods in question had already become exports and in most cases actually were at sea when the collector required the stamps to be affixed. This he certainly had no authority to do.

SIXTH.

The preliminary objections to the jurisdiction of the District Court were also taken in the case of Frederick W. Hvoslef *et al. v.* United States.

They were overruled by Circuit Judge Noyes. A writ of error in this case has been sued out by the United States and is now No. 331 on this docket. If renewed by the United States in that case, they will be argued there.

SEVENTH.

The judgment should be reversed, the demurrer overruled, and the case remanded for further proceedings.

EVERETT P. WHEELER,
Of Counsel for plaintiff in error.

APPENDIX TO BRIEF.

APPLICATION FOR CARGO INSURANCE.

From Collector of Customs at.....

The United States of America

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE

WASHINGTON, D. C.

Insurance is limited to cargoes on American vessels against the risks of war and may only be effected when the marine risks of the said cargo are insured by approved insurance companies or underwriters.

Insurance is wanted by For account of Loss, if any, payable to	DESCRIPTION OF MERCHANDISE. (Include marks and numbers.)	MARINE INSURANCE CARRIED. Company. Amount.
Per vessel of line or owner.	MERCHANDISE. Valued at Amount insured.	Rate Premium.

At and from to

Application is made for insurance against war risks on the form of policy issued by the Bureau of War Risk Insurance, the following special conditions being imposed, which conditions may not be changed except under signature of the Director of the Bureau of War Risk Insurance:

A. Warranted that the vessel will sail within fifteen days from the date on which this insurance is effected, but in the event of the vessel sailing after that time it is agreed to hold the assured covered on notice to and payment of the additional premium required by the Bureau of War Risk Insurance based on rates current at the time of sailing.

B. The amount insured against war risks can not under any circumstances exceed the amount insured against marine risks. If the applicant is unable to state definitely the amount to be insured he shall declare a provisional amount, which may not be increased, but which may be reduced upon receipt of definite advice, to an amount not less than the total amount insured under marine policies. Premium shall be paid on this provisional amount, and if the amount is reduced when final particulars are known the excess of such premium will be returned to the assured by the Treasury Department of the United States Government.

An application not stamped "Paid" by a Government representative is null and void.

C. The following articles will not be insured if destined to countries of the belligerents or their colonies:

(1) Arms of all kinds, including arms for sporting purposes and their distinctive component parts.
(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
(3) Powder and explosives especially prepared for use in war.
(4) Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
(5) Clothing and equipment of a distinctively military character.
(6) All kinds of harness of a distinctively military character.
(7) Saddle, draught, and pack animals suitable for use in war.
(8) Articles of camp equipment and their distinctive component parts.
(9) Armor plates.
(10) Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.

premium required by the Bureau of War Risk Insurance based on rates current at the time of sailing.

B. The amount insured against war risks can not under any circumstances exceed the amount insured against marine risks. If the applicant is unable to state definitely the amount to be insured he shall declare a provisional amount, which may not be increased, but which may be reduced upon receipt of definite advice, to an amount not less than the total amount insured under marine policies. Premium shall be paid on this provisional amount, and if the amount is reduced when final particulars are known the excess of such premium will be returned to the assured by the Treasury Department of the United States Government.

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(6) All kinds of harness of a distinctively military character.
(7) Saddle, draught, and pack animals suitable for use in war.
(8) Articles of camp equipment and their distinctive component parts.
(9) Armor plates.
(10) Warships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.
(11) Aeroplanes, airships, balloons, and air craft of all kinds and their component parts, together with accessories and articles recognizable as intended for use in connection with balloons and air craft.
(12) Implements and apparatus designed exclusively for the manufacture of munitions of war and for the manufacture or repair of arms, or war material for use on land and sea.

D. The following articles will not be insured if destined for the use of the armed forces or of a government department of a belligerent state, or are consigned to the authorities of a belligerent state, or to a contractor established in a belligerent country who, as a matter of common knowledge, supplies articles of this kind to a belligerent state, or are consigned to a fortified place belonging to a belligerent or other place serving as a base for the armed forces of a belligerent:

(1) Foodstuffs.
(2) Forage and grain suitable for feeding animals.
(3) Clothing, fabrics for clothing, and boots and shoes suitable for use in war.
(4) Gold and silver in coin or bullion; paper money.
(5) Vehicles of all kinds available for use in war, and their component parts, including automobile tires and treads.
(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks, and their component parts.
(7) Railway material, both fixed and rolling stock, and materials for telegraphs, wireless telegraphs, and telephones.
(8) Fuel; lubricants.
(9) Powder and explosives not specially prepared for use in war.
(10) Barbed wire and implements for fixing and cutting the same.
(11) Horseshoes and shoeing materials.
(12) Harness and saddlery.
(13) Field glasses, telescopes, chronometers, crystalines, and all kinds of nautical instruments.
(14) Copper, nickel, and lead in pig, sheet, or pipe.
(15) Iron and steel of all kinds and oxides, sulphates, and carbonates of iron.
(16) Hematite iron ore; magnetic iron ore.
(17) Ferrochrome.
(18) Glycerine.
(19) Rubber.
(20) Hide and skins, raw or rough tanned (not including dressed leather).

.....

Applicant.

No. 3
CARGO

No._____

The United States of America

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE

WASHINGTON, D. C.

.....*on account of whom it may concern.*

In case of loss, to be paid in funds current in the United States to

Do make insurance and cause to be insured at and from

SUM INSURED

$..... _____ Dollars.

Upon.....per the Vessel called the.....

or by whatsoever other name or names the said vessel is or shall be named or called, beginning the adventure upon the said goods and merchandise from the loading thereof on board the said vessel as above, and shall so continue and endure during her abode there and until the vessel with her goods and merchandise shall be arrived at as above and be there discharged and safely landed. The said cargo for so much as concerns the insured, by agreement between the insured and the insurers

TREASURY DEPARTMENT

BUREAU OF WAR RISK INSURANCE

WASHINGTON, D. C.

.....*on account of whom it may concern.*

In case of loss, to be paid in funds current in the United States to

Do make insurance and cause to be insured at and from

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Touching the adventures and perils which the insurer is contented to bear, and does take upon itself, they are of men-of-war, letters of marque and countermarque, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and peoples, of what nation, condition, or quality soever, and all consequences of hostilities or war-like operations, whether before or after declarations of war.

Warranted not to abandon in case of blockade and free from loss arising from an attempt to evade blockade, but, in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

Warranted not to abandon in case of capture, seizure, or detention until after condemnation.

Warranted free from any claim for interest, loss of market or damage by deterioration due to delay.

This policy does not extend to or cover absolute contraband of war or conditional contraband of war when the articles constituting such conditional contraband are destined for the use of the armed forces or of a government department of a belligerent state, or are consigned to the authorities of a belligerent state, or to a contractor established in a belligerent country who, as a matter of common knowledge, supplies articles of this kind to a belligerent state, or are consigned to a fortified place belonging to a belligerent or other place serving as a base for the armed forces of a belligerent.

And in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants, and assigns, to sue, labor and travel for, in and about the defense, safeguard, and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance, to the charges whereof the insurer will contribute according to the rate and quantity of the sum herein insured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment; having been paid the consideration for this insurance, by the insured or.....assigns, at and after the rate of.....per cent.

PREMIUM

$.....

It is agreed that this insurance shall not be vitiated by a deviation from the voyage provided the same be communicated to the Bureau of War Risk Insurance as soon as known to the insured and an additional premium paid if required.

Warranted sailing under the American flag.

In the event of loss and claim, prompt notice should be given the Bureau of War Risk Insurance. Claims will be paid within thirty days after complete proofs of interest and loss have been filed with the Bureau.

IN WITNESS WHEREOF, The United States of America has caused this policy to be signed by its Secretary of the Treasury, but it shall not be valid until countersigned by William C. De Lanoy or J. Brooks B. Parker.

Secretary.

Countersigned at Washington, D. C., this ..... day of ....., 191.....

.....

Director.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 616.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR,

against

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EVERETT P. WHEELER,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 616.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR,

against

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

First.

Residence Petitioner.

1. It is obvious from the allegations of petition that petitioner is a foreign corporation. If the allegation is not specific enough it was amendable and would have been amended in the court below if objection on this ground had been specified. The failure to specify it was a waiver.

See cases cited under First Point, supplemental brief in Hvoslef case, No. 331.

2. The limitation as to residence does not apply to foreign corporations if the word resident in the Tucker Act be strictly construed. It could not have been the intent of Congress to exclude foreigners from the benefit of that act.

N. Y. & O. S. S. Co. *vs.* United States, 202 Fed., 311.

3. In ordinary language a foreign corporation has a residence in the district where it has its principal place of business.

In re Hohorst, 150 U. S., 653.

The allegation of petition is (R., 2):

> "Its principal office for conducting said business in the United States, *and its residence was and is* in the Borough of Manhattan, city of New York, *in said district.*"

This is admitted by demurrer.

Second.

Report Judiciary Committee.

The Solicitor General appends to his brief in the Hvoslef case (No. 331) a copy of a report from the Judiciary Committee of the House upon the bill which, in amended form, became the act of July 27, 1912, alleged in petition (R., 4). This report cannot affect the decision here.

1. It is only in cases where the language of an act is obscure that such reports can be considered.

There is no question here of strict or liberal construction. Congress has passed a just act; the case is directly within its terms; the sum claimed is alleged to have been wrongfully collected under the provisions of the war-revenue tax, and the claim has been presented to the Commissioner of Internal Revenue.

The report which defendant cites expressly says that the bill is intended to take the place of many special acts pending in Congress. It declares that the Secretary of the Treasury "has several times recommended that general legislation be enacted giving these claimants (that is, those who had applied to Congress) additional time in which to present claims for the refund of taxes erroneously assessed or illegally collected under the act of June 13, 1898, commonly known as the Spanish War Revenue Tax Act" (Brief, p. 37).

It is true that the last paragraph of the report makes special reference to particular claims, but it is equally clear that the Government was desirous that instead of special acts there should be general legislation on the subject. These very claimants had a bill for their special relief pending in the Senate at the time this report was made. It was in reference to this as well as to all the other bills pending that the Secretary made his recommendation. So far from throwing any doubt on the construction of the act in question, this report tends to confirm plaintiff's contention that the act is a general one and comprehends all claims for the refund of taxes wrongfully collected under the War Revenue Tax.

The report reads as if it had been drafted with reference to one class of claims, but that the draftsman amended it so as to apply to all the pending claims for which relief was sought. This would account for the generality of some paragraphs and the more limited language of others.

Third.

Policies or Certificates of Insurance Are Commercially Necessary to Carry on the Export Trade.

The bill of lading and the bill of exchange are not the only documents essential to export business. No bank would discount a draft secured *only* by a bill of lading, and no purchaser would accept or pay the draft in exchange for a

bill of lading only. Both banker and buyer require protection by insurance against the dangers incident to the export transit. It would be absolutely impossible to finance the country's export trade without insurance. Every exporter is required to annex to his draft against the purchaser abroad, not only a bill of lading which shows that the goods have been delivered to the carrier, but also an insurance certificate which shows that he has insured the goods while in transit. The absolute necessity for attaching the insurance certificate to the draft cannot be questioned.

It is generally admitted that our export commodities are in large part moved by foreign capital. In his message to Congress of December, 1910, President Taft, in discussing cotton bills of lading, referred to the fact that the money which foreign bankers "furnished to move our cotton crop is of great value to this country." During the present European war the proportion of domestic capital which is used to move our exports is larger. In either cases insurance is essential.

How is it that the capital is actually supplied for our needs? To answer the question we must refer to the way in which our export documents are handled. The ordinary export sale is based on what is known as a c. i. f. contract (cost, insurance, and freight). Under such a contract, the purchaser of goods pays a fixed sum, which covers the cost of the goods, the cost of insurance while in transit, and the export freight. For instance, a shipper in Memphis, by cable, sells 100 bales of cotton c. i. f., his draft for payment to be drawn against the London City and Midland Bank, payable 60 days after sight. The cotton is delivered to a carrier and a through bill of lading is obtained, under which the cotton is made deliverable to the order of this *shipper*. The latter endorses this bill of lading in blank, draws his draft against the banker abroad, insures his goods against loss in transit, attaches to his draft both the bill of lading and the insurance certificate, and then takes these

documents to his local bank to have the draft discounted. The local bank advances him the amount of his draft, less discount, and forwards the draft to New York. New York bankers, needing foreign exchange, buy the draft, and forward it abroad for acceptance; the London City and Midland Bank accepts the draft, and then the London money market loans upon it until the date of maturity arrives. Between the date upon which the draft is drawn and the date of payment, the local banker, the New York exchange buyer, and in some instances, where the drafts are payable 80 or even 120 days after sight, three or four European bankers are at different times legal owners of the draft and hold legal title to the goods as collateral security for the payment of the draft.

See cases cited on pages 11-14, principal brief.

Our export trade in 1910 amounted to over two billion dollars. In 1911 the value of our export cotton alone was over five hundred and eighty-five million dollars. To obtain such vast sums of money application must be made to the money centers of the world, and such application would be useless if the American shipper did not, at the outset, insure the exported goods against which his drafts are drawn in such a way as to protect in turn each holder of the bill of lading and the draft.

Assume that an exporter applies to a local bank for the discount of an export draft without an insurance certificate attached. The banker must inevitably ask what his security will be if the goods are destroyed while he holds the bill of lading. The only possible answer is that he will have no security left whatever except, perhaps, a dubious lawsuit against the carrier. Obviously, if the bankers had no protection against the perils of the sea, or other risks of transportation, they could not and would not discount drafts drawn against export goods. The only commercially possible way is for the shipper to effect insurance as soon as the goods are ready for shipment, and so to arrange his insur-

ance that the protection of his policy shall inure to the benefit of each holder of the bill of lading, no matter how often it may be transferred from one party to another.

Fourth.

When Commerce Begins.

The authorities on the subject of taxation throw light upon the subject under consideration.

Coe vs. Errol, 116 U. S., 517:

It was there held that the moment when the change of jurisdiction takes place is that (p. 525), "in which they (the goods) commence their final movement for transportation from the State of their origin to that of their destination."

P. 527: They cease to be subject to taxation when "they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey."

So, in *The Daniel Ball,* 10 Wall., 557 (565), the court said:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."

In the case at bar the policies or certificates become part of the export trade the moment the goods begin their movement to the ship, for exportation, and the certificates of insurance covering them are signed (R., 2, 3, 6).

The stamp tax was exacted and paid after this (R., 3, Sixth Article, Petition).

Fifth.

The argument for the Government leads logically to the conclusion that the States could tax export charter parties and policies of marine insurance on exports. So far as taxes on exports are concerned the prohibition on the States is in the same language as that on Congress. Does the Government seriously contend that a State tax on such charter parties and policies of insurance would be valid? If such be the case the States could cripple or destroy foreign commerce. Is not this a *reductio ad absurdum?*

EVERETT P. WHEELER,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE THAMES AND MERSEY MARINE INSURANCE Company, Limited, Plaintiff in Error,
v.
THE UNITED STATES.
No. 616.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case is in many respects analogous to *United States* v. *Frederick W. Hvoslef et al.*, No. 331, October Term, 1914.

As in that case, the action was brought against the United States under the Tucker Act of March 3, 1887, 24 Stat. 505, to recover internal revenue taxes paid without protest under the provisions of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 460.

The cases differ only in the subject-matter of taxation. In the *Hvoslef* case the taxes were paid upon charter parties for vessels engaged in the

export trade. In the *instant* case the taxes were paid on policies of marine insurance covering cargoes exported from the United States.

It is insisted for the Government:

First. That the District Court was without jurisdiction of the action.

Second. That the petition fails to state a cause of action.

Third. That the tax on policies of marine insurance imposed by the War Revenue Act is constitutional.

ARGUMENT.

I.

The District Court was without jurisdiction of the action.

1. The claim of the petitioner was presented to the Commissioner of Internal Revenue and by him rejected. The remedy of petitioner was therefore an action against the Collector of Internal Revenue and not against the United States.

It is not necessary to amplify what has been said on this subject on behalf of the Government in the briefs filed in *United States* v. *Emery, Bird, Thayer Realty Company,* No. 117 on the present docket of this court, and *United States* v. *Frederick W. Hvoslef et al.,* No. 331.

2. It does not affirmatively appear that the action was brought in the district in which the petitioner resides.

As pointed out in the brief in the last named cause, this is a jurisdictional requirement under the Tucker Act.

The petition avers (R. 2) that--

> The Thames & Mersey Marine Insurance Company, Limited, is and was a corporation engaged in the business of underwriting policies of marine insurance in the City of New York, within the District aforesaid, between the first day of July, 1898, and the first day of July, 1901. Its principal office for conducting said business in the United States and its residence was and is in the Borough of Manhattan, City of New York, in said District.

It is submitted that this is not tantamount to a legal averment that the petitioner is a resident of the district in which the action is brought, for the reason that it fails to allege that petitioner was incorporated under the laws of the State of New York.

An allegation that a corporation is doing business in a certain State does not necessarily import that it was created by the laws of that State. *Brock* v. *Northwestern Fuel Co.,* 130 U. S. 341. In the absence of some express statute to the contrary, a corporation is in law a resident only of the jurisdiction in which it was incorporated.

In *Insurance Co.* v. *Francis,* 11 Wall. 210, 216, the court said:

> The declaration avers that the plaintiff in error (the defendant in the court below) is a corporation created by an act of the legislature of the State of New York, located

> in Aberdeen, Mississippi, and doing business there under the laws of the State. This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there.

In *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, Mr. Justice Gray, after stating and quoting from a number of cases (pp. 451–452) said (p. 453), in effect, that it has long and uniformly been declared to be the law by the Supreme Court "within the meaning of the previous acts of Congress giving jurisdiction of suits between citizens of different States, a corporation could not be considered a citizen or a resident of a State in which it had not been incorporated."

II.

The petition fails to state a cause of action in that it does not show that the tax was paid involuntarily and after protest.

On this subject we rely on what has been said in the brief for the Government in *United States* v. *Hvoslef*, No. 331.

III.

The tax which was imposed upon policies of marine insurance was not unconstitutional.

The provision under which the tax was collected reads as follows (30 Stat. 461):

> Insurance (marine, inland, fire): Each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description (including rents or profits), whether against peril by sea or inland waters, or by fire or lightning, or other peril, made by any person, association, or corporation, upon the amount of premium charged, one-half of one cent on each dollar or fractional part thereof: *Provided,* That purely cooperative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property and not for profit shall be exempted from the tax herein provided.

The underlying proposition upon which the petition is based is that the taxation of a contract insuring exports amounts to a tax upon exports themselves on the theory that the contract of insurance is a necessary part of the exportation.

The difficulty of this argument is that it wholly overlooks the distinction between instruments of exportation and incidents of exportation, to which latter class policies of marine insurance clearly belong.

In a long line of decisions, beginning with *Paul* v. *Virginia,* 8 Wall. 168, and ending with *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, wherein the cases are collected and reviewed (pp. 502–508), it has been firmly established that insurance is not commerce; that a contract of insurance is not an instrumentality of commerce; that the making of such a contract is a mere incident of commercial intercourse; and that in this respect there is no difference between a contract of marine insurance and one covering risks by fire. *Hooper* v. *California,* 155 U. S. 648.

It is for the reason that insurance is a mere incident and not a part of commerce that the State's power over the subject is absolute and not limited by the interstate commerce clause of the Constitution. As was said in the *Deer Lodge* case, *supra,* p. 506, in discussing the decision in *Hooper* v. *California, supra:*

> * * * To the attempt to distinguish between policies of marine insurance and policies of fire insurance, and thus take the former out of the rule of *Paul* v. *Virginia,* it was answered, "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other." And it was pointed out that if the power to regulate

> interstate commerce applied to all of the incidents of such commerce and "to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature." And then, sweeping away the distinction between the different subject-matters of insurance contracts, and the different events indemnified against, and declaring the principle applicable to all and determinative of the regulating power of the States over all, it was said, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

If insurance is not commerce under the interstate commerce clause, surely it cannot be foreign commerce within the meaning of the clause exempting exports from a tax by Congress. Exports are goods carried in foreign commerce, and in order to be an export the article or thing must be a part of that commerce. A vessel, a bill of lading, or a manifest, may be a part of that commerce because an instrument of exportation. How widely insurance on articles exported differs from

these instrumentalities it needs no elaborate argument to demonstrate.

A policy of insurance is in essence an agreement to pay money upon the happening of a certain contingency. When that contingency arises the policy becomes a chose in action, to be reduced to possession at the place where the policy was entered into or at the domicile of the insurer, as the terms of the policy may prescribe. At no period of its existence does a policy transfer any title whatever to the goods insured nor stand as their representative. The sole connection between the two is the fact that loss or damage occurring to the goods fixes the time when and the contingency upon which a right of action accrues upon the policy.

It is suggested in the brief for the plaintiff in error that the policy itself is an article exported because it is forwarded to the foreign consignee and actually makes the trans-oceanic voyage. Of course, there may be some property right in the actual document itself, and some monetary value, although infinitesimal, in the sheets of paper which compose it. But to say that by reason of this fact it is an " article " of export is at least highly fanciful. The sole importance of the policy is its evidentiary character as proving the contract made, which might be established even after the loss or destruction of the policy itself, and without which the document is so much waste paper.

Moreover, such a paper is no more an article of export within the meaning of the Constitution than a deed for real estate in this country which is mailed for safe-keeping to a foreign grantee. It would require some stretch of the imagination to hold a stamp tax upon the latter a tax upon articles exported.

The taxes involved in this case affect articles exported in only the most remote and incidental manner, and a provision therefor is no more unconstitutional than an act of Congress in regulation of commerce which has a mere incidental effect upon exportations (*Armour Packing Co.* v. *United States,* 209 U. S. 56, 79–80; *C. B. & Q. Ry. Co.* v. *United States,* 209 U. S. 90); or than a law of a State passed in the exercise of the police power and having that as its primary purpose, with a remote and incidental effect, however, upon interstate commerce. *McLean* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, 50.

The effect of a contrary holding must not be overlooked. To say that taxation of the insurance of goods exported from this country is unconstitutional means the giving of immunity from all taxes of every kind and description, to all property and persons in any way incidentally connected with foreign trade. The States are prohibited by Article 1, section 10, paragraph 2, of the Constitution from imposing any imposts or duties on imports or exports. And Mr. Justice Bradley in *Turpin* v.

Burgess, 117 U. S. 504, said with reference to these parallel provisions of the Constitution (p. 506):

> * * * the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State.

There seems no limit to the tax exemption which would necessarily result from a decision holding this tax unconstitutional. If one incident of foreign commerce is exempt all incidents are so exempt. No line of distinction can be drawn between one incident and another if the clear, well-defined, line of demarcation between incidents of commerce and instrumentalities of commerce is to be abandoned.

Apparently the petitioner in the preparation of its brief was not entirely oblivious to the distinction, for, in order to colorably surmount this obstacle it is alleged in the fifth paragraph of the petition (R. 3) that,—

> Your petitioner is informed and believes that bills of exchange were drawn by the exporters against the respective consignees of said products and merchandise for the price thereof and that the bills of lading for said products and merchandise, so exported as aforesaid, and the said certificates of insurance were required, by custom and usage, as documents necessary to enable the said export to be made and the said bills of exchange to be discounted and were actually

forwarded to the foreign country to which each such export was made.

These allegations, however, are allegations of general business usage, of which the court takes judicial notice. The court judically knows that it is business policy today, and has been for all time, to insure goods passing in foreign commerce. This is, however, a mere matter of business convenience. A contract of insurance does not in any way assist to carry the goods or to start them on their voyage, nor even to evidence the title thereto, and has no physical relation whatever to foreign commerce.

CONCLUSION.

For these reasons, as well as those stated at more length in the brief filed in *United States* v. *Hvoslef*, No. 331, above referred to, the judgment of the court below should be affirmed.

JOHN W. DAVIS,
Solicitor General.

THEODOR MEGAARDEN,
Attorney.

JANUARY, 1915.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT.	No. 331.	2
THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES.	No. 616. Motion to Advance.	3

Come now the defendants in error, Frederick W. Hvoslef and William S. Walsh, Survivors of William Bennett, in the cause first entitled as above, and The Thames and Mersey Marine Insurance Company, Limited, plaintiff in error, in the cause secondly entitled as above, by their counsel, Everett P. Wheeler, in their behalf, and move

4 the Court on the records duly filed herein, and on the annexed affidavit of Henry M. Hewitt, to advance the hearing of the above entitled causes and set the same for argument at some time during the present term of this Court, and to grant to the said parties such other and further relief as they may be entitled to receive.

EVERETT P. WHEELER,
Of Counsel for Frederick W. Hvoslef and others.

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SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT. 8

No. 331.

THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

No. 616.

UNITED STATES OF AMERICA, Southern District of New York, } ss.: 9

HENRY M. HEWITT, being duly sworn, deposes and says:

1. I am an attorney at law in the office of the firm of Haight, Sandford & Smith, attorneys at law in the City of New York. They were the attorneys for the defendants in error in the action first entitled as above, and for the plaintiff in error in the action secondly entitled as above, in

10 the District Court of the United States for the Southern District of New York, and I am familiar with the said cases and with the proceedings therein. The cause first entitled as above which will hereinafter be described as the Hvoslef case, was begun in said last mentioned Court February 10th, 1913, by the filing of a petition in said Court, asking for the refund of certain stamp taxes which had been demanded and received by the United States of America, and claimed under the provisions of the War Revenue Act of Congress approved June 13th, 1898, by which Act it was enacted that on every
11 charter-party there should be levied, collected and paid a certain tax therein specified. The said petition alleged that the said requirement of said War Revenue Act was in violation of the Ninth Section of the First Article of the Constitution of the United States, which provides—"No tax or duty shall be laid on articles exported from any state." The charter-parties upon which taxes were paid by the defendants in error, were alleged in said petition to be for vessels used entirely in the export trade from States of the United States.

12 2. The said petition was filed and the said action brought pursuant to an act of Congress approved July 27th, 1912. The said action was first heard before Honorable Walter C. Noyes, United States Circuit Judge, who delivered an opininon in favor of the plaintiffs in the Court below and held the taxes on charter-parties of vessels for export of goods from the United States to foreign countries to be unnconstitutional. The cause was afterwards heard before Honorable George C. Holt, United States District Judge. Upon the

pleadings and proofs he directed judgment be entered in favor of the plaintiffs for $353. To review the judgment so entered, a writ of error was sued out by the United States and the record in said suit was filed in this Court January 7, 1914. 13

3. The cause secondly entitled as above, which will be hereinafter described as the Thames and Mersey case, was brought by The Thames and Mersey Marine Insurance Company, in said District Court against the United States of America by a petition filed June 26th, 1914. This suit was brought pursuant to the said act of Congress approved July 27th, 1912, to recover certain revenue taxes amounting to $5,500 which had been assessed on marine policies of insurance underwritten by the petitioner, now plaintiff in error, which did insure against marine risks certain merchandise exported by the United States to foreign countries. It claimed in said petition that the provisions of the said War Revenue Act, whereby a tax was levied on every policy of marine insurance, was in violation of said section of the Constitution of the United States, so far as it applied to revenue stamps required to be paid in respect of policies of marine insurance upon articles exported from any State. The defendant demurred to said petition. The said demurrer was heard before Honorable L. Hand, District Judge, in July, 1914, who rendered an opinion that the provisions of said War Revenue Act, so far as they applied to taxes on policies of marine insurance upon articles exported, were constitutional. He thereupon ordered that the demurrer be sustained and judgment dismissing the petition was rendered in favor of the defendant August 18th, 1914. The said Thames & Mersey Company there- 14 15

upon sued out a writ of error and the record pursuant to the requirement of said writ was filed in this Court, September 4th, 1914.

4. The questions involved in these cases as to the true construction and effect of said section of the Constitution of the United States, are of great importance, not only to the parties to the litigation but to the general public, and they should therefore be decided finally by this Court at an early day. I respectfully submit that it would be in the interest of justice that the two cases should be advanced and should be heard together, inasmuch as they involve the construction and effect to be given to said section of the Constitution of the United States.

5. One of the points taken by the United States in both cases, was that the action should have been brought against the Collector of Internal Revenue and not against the United States. This contention was overruled in the Hvoslef case and was not sustained in the Thames & Mersey case. There is another case pending in this Court, Number 117 on the docket, United States, Plaintiff in Error, *vs.* Emery, Bird, Thayer Realty Company, in which this question also arises. The other questions in that case relate to the construction and effect of Section number 38 of the act of Congress entitled an act to provide revenue, etc., approved August 5th, 1909, and are entirely different from the constitutional questions which arise in the cases in which this motion is made. Inasmuch as the question of jurisdiction arises in all three cases, I respectfully submit that it would be con-

venient if the cases in which this motion is made, should be assigned to be heard after Number 117.

HENRY M. HEWITT.

Sworn to before me this 2nd day of November, 1914.

J. DEXTER CROWELL,
Notary Public,
Kings Co.
Certificate filed in N. Y. Co.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT.	No. 331.
THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES.	No. 616.

TAKE NOTICE that the defendants in error in the action first above entitled, and the plaintiff in

22 error in the action secondly above entitled, will on Monday the 9th day of November, 1914, or as soon thereafter as counsel can be heard, submit to this Court for its decision thereon, the motion and affidavit of which the foregoing are a copy.

EVERETT P. WHEELER,
of Counsel for Motion.

To the Attorney General of the United States.

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THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 616. Argued January 13, 1915.—Decided April 5, 1915.

United States v. *Hvoslef*, *ante*, p. 1, followed to effect that the requirement of § 5 of the Tucker Act, requiring the suit to be brought in the District in which claimant resides, is one of procedure which can be waived and is waived by a general appearance.

Although the Government may assert in its demurrer to an action brought in the District Court for refund of taxes under the Tucker Act that it appears specially, a demurrer which raises not only the question of jurisdiction of the subject-matter of the action but also that of the merits—seeking to obtain a decision on the constitutionality of the tax—is in substance a general appearance and amounts to a waiver of objection with respect to the district in which the suit is brought.

Exportation is a trade movement and the exigencies of trade determine what is essential to the process of exporting.

Insurance against loss is an integral part of exportation and is so vitally connected therewith that a tax on the policies is essentially a tax upon the exportation as such.

Taxes on policies of marine insurance on exports are within the prohibitions of § 9, Art. I, of the Federal Constitution, prohibiting any tax or duty on articles exported from any State; and *held* that amounts paid for stamps on such policies under the War Revenue Act of 1898 were illegally exacted and recoverable under the Refunding Act of July 27, 1902.

217 Fed. Rep. 685, reversed.

THE facts, which involve the construction of § 9, Article I, of the Federal Constitution, prohibiting any tax or duty on exports and the validity of stamp taxes under the War Revenue Act of 1898 on policies of marine insurance on exports, are stated in the opinion.

Mr. Everett P. Wheeler for plaintiff in error:

Insurance policies on exports are articles exported. Art. I, § 9, Cl. 5, Fed. Const.

Constitutional prohibition applies when the document taxed is intended to, and does become a part of the business of exporting. *Fairbank* v. *United States*, 181 U. S. 283; *Almy* v. *California*, 24 How. 169; *N. Y. & Cuba S. S. Co.* v. *United States*, 125 Fed. Rep. 320, and see act of Feb. 1, 1909, 35 Stat. 590.

The policy of insurance is a part of the usual commercial documents on the export of goods. *Tamvaco* v. *Lucas*, 30 L. T. Q. B. 234; *Hickox* v. *Adams*, 34 L. T. N. S. 404; Benjamin on Sales, 5th ed., § 590, p. 705; *Mee* v. *McNider*, 109 N. Y. 500; and see act of Sept. 2, 1914 (Public 193), establishing Government War Insurance Bureau.

When these policies were issued to cover exports, they became at once an instrumentality of export and as such were not taxable. *Paul* v. *Virginia*, 8 Wall. 168, distinguished.

The argument that the tax is upon goods within the domestic jurisdiction is rebutted. *Cornell* v. *Coyne*, 192 U. S. 415, distinguished.

In support of these contentions see cases *supra* and *The Antelope*, 2 Ben. 405; *Cunningham* v. *Hall*, 1 Cliff. 43; *Hickox* v. *Adams*, 34 L. T. N. S. 404; *Ireland* v. *Livingston*, L. R. 5 H. L. 395; *Nathan* v. *Louisiana*, 8 How. 73; *People's Ferry Co.* v. *Beers*, 20 How. 393; *Stroms Bruks &c.* v. *Hutchinson*, 1905, App. Cas. 515; *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, distinguished.

Mr. Solicitor General Davis, with whom *Mr. Theodor Megaarden* was on the brief, for the United States:

The District Court was without jurisdiction of the action.

The claim of the petitioner was presented to the Commissioner of Internal Revenue and by him rejected. The

remedy of petitioner was therefore an action against the Collector of Internal Revenue and not against the United States.

It does not affirmatively appear that the action was brought in the district in which the petitioner resides.

An allegation that a corporation is doing business in a certain State does not necessarily import that it was created by the laws of that State. *Brock* v. *Northwestern Fuel Co.*, 130 U. S. 341; *Insurance Co.* v. *Francis*, 11 Wall. 210; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444.

The petition fails to state a cause of action in that it does not show that the tax was paid involuntarily and after protest.

The tax which was imposed upon policies of marine insurance was not unconstitutional.

In *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; and *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, it has been held that insurance is a mere incident, and not a part of commerce and that the State's power over the subject is absolute and not limited by the interstate commerce clause of the Constitution.

As insurance is not commerce under the interstate commerce clause, it cannot be foreign commerce within the meaning of the clauses exempting exports from a tax by Congress.

The taxes involved in this case affect articles exported in only the most remote and incidental manner, and a provision therefor is no more unconstitutional than an act of Congress in regulation of commerce which has a mere incidental effect upon exportations. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 79–80; *C., B. & Q. Ry.* v. *United States*, 209 U. S. 90; *McLean* v. *Denver & R. G. R. R.*, 203 U. S. 38, 50.

The effect of a contrary holding must not be overlooked. It means the giving of immunity from all taxes of every kind and description, to all property and persons in any

way incidentally connected with foreign trade. See *Turpin* v. *Burgess*, 117 U. S. 504.

A contract of insurance does not in any way assist to carry the goods or to start them on their voyage, nor even to evidence the title thereto, and has no physical relation whatever to foreign commerce.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error is a corporation engaged in the business of underwriting policies of marine insurance. It brought this action to recover the amount paid as stamp taxes upon policies insuring certain exports against marine risks. The taxes were paid under the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 461; and the recovery was sought under the provisions of the act of July 27, 1912, c. 256, 37 Stat. 240, upon the ground that the tax was invalid, being in substance a tax upon exportation and hence contrary to § 9, Article I, of the Federal Constitution, prohibiting any tax or duty on articles exported from any State.

It was alleged that the policies were issued in the following manner: Open policies were executed by the Insurance Company containing an agreement that the Company would insure all cargoes which the insured should ship in the foreign trade during the life of the policies, and that the shipper would procure such insurance and from time to time would pay the premiums according to the regular rates for the particular voyages. When the shipper had a cargo of goods ready for export, 'designated and set apart from all other goods for shipment on a particular ship,' he filled up certain blank forms of declaration (furnished to him by the Company) in accordance with the facts of each case and delivered the declaration to the Company at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration

was not delivered until the vessel had sailed. Upon receiving each of the declarations, the Company entered the amount and rate of the premium and delivered to the shipper a certificate of insurance by which the goods described were insured for the voyage and upon the vessel specified. It was further averred that bills of exchange were drawn by the exporters on the consignees of the merchandise for the purchase price, and that the bills of lading and the certificates of insurance were by custom required as the necessary documents to enable the exports to be made and the bills to be discounted; and that these documents were actually forwarded to the foreign country to which the goods were shipped. At the end of each month, the Company rendered to the insured a bill for the premiums which had accrued in accordance with the declarations; and, monthly, the Company presented to the Collector a book containing a summary of the premiums earned in respect of such insurance and purchased the stamps required by the War Revenue Act. By direction of the Collector—in accordance with the method prescribed for mutual convenience by the Commissioner of Internal Revenue—these stamps were affixed to the book and then canceled. In each case, the goods were in fact exported and were insured during their transit by sea to the foreign ports. The claim for the refunding of the taxes was duly presented to the Collector, it was alleged, under the act of 1912, and was transmitted to the Commissioner of Internal Revenue who refused payment.

The Government demurred upon the grounds that the court had no jurisdiction of the defendant, or of the subject of the action, and that the petition did not state facts sufficient to constitute a cause of action. The District Court sustained the demurrer, holding the tax to be a valid one (217 Fed. Rep. 685). Judgment was entered dismissing the petition, and this writ of error has been sued out.

The Government seeks to support the judgment by

denying the jurisdiction of the District Court upon the ground that it was not shown that the petitioner resided within the district (act of March 3, 1887, c. 359, § 5, 24 Stat. 505, 506), as it was not set forth that the petitioner was incorporated in the State of New York (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444). It was alleged that the petitioner was a corporation and that 'its principal office for conducting said business in the United States and its residence was and is in the Borough of Manhattan, City of New York, in said District.' On behalf of the Company, it is asserted in argument that it is a foreign corporation, that is, foreign to the United States, and hence it is insisted that the provision of § 5 of the Tucker Act is inapplicable (citing *In re Hohorst*, 150 U. S. 653, 660). This question is not here, as the record does not show the place of incorporation. But the contention of the Government is inadmissible for the reason that it does not appear that the objection as to the district was raised below, and the decision of the District Court, which has jurisdiction 'concurrent with the Court of Claims' of the subject-matter of such an action within the prescribed limit as to amount (Jud. Code, § 24, par. 20), was invited upon the merits. The requirement of § 5 of the Tucker Act (which was saved from repeal, Jud. Code, § 297), is one of procedure which could be waived (*United States* v. *Hvoslef*, *ante*, p. 1), and the question of jurisdiction submitted under the demurrer was deemed by the District Court to be the same as that which had been considered and decided in the *Hvoslef Case* (217 Fed. Rep. 680, 682, 683); that is, as to the authority to entertain a suit against the United States under the act of July 27, 1912, *supra*. While the Government asserted in its demurrer that it appeared specially, it raised by that pleading not simply the question of the jurisdiction of such a suit against the United States but also that of the merits, seeking, and thus obtaining, a decision as to the constitutionality of

the tax and hence of the insufficiency of the facts alleged to support a recovery. Such a demurrer is in substance 'a general appearance to the merits' and is a waiver of objection with respect to the district in which the suit was brought. *Western Loan Co.* v. *Butte Mining Co.*, 210 U. S. 368, 372; *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127, 130.

The other preliminary questions being identical with those determined in *United States* v. *Hvoslef*, *supra*, we come at once to the application of the constitutional provision; and upon this point it is unnecessary again to review the decisions establishing the governing principle. There, the question was as to the validity of the tax upon charter parties which were exclusively for the carriage of cargo from state ports to foreign ports, and, here, the question is as to the tax upon policies insuring such exports during the voyage. Is the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition? It is manifest that we are not called upon to deal with transactions which merely anticipate exportation, or with goods that are not in the course of being actually exported (*Coe* v. *Errol*, 116 U. S. 517; *Turpin* v. *Burgess*, 117 U. S. 504; *Kidd* v. *Pearson*, 128 U. S. 1; *Cornell* v. *Coyne*, 192 U. S. 418). Nor have we to do, in the present case, with the taxation of the insurance business, as such, or with the power of the State to fix the conditions upon which foreign corporations may transact that business within its borders (*Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *Noble* v. *Mitchell*, 164 U. S. 367; *Nutting* v. *Massachusetts*, 183 U. S. 553; *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495). Let it be assumed, as this court has said, that the insurance business, generically considered, is not commerce; that the contract of insurance is a personal contract,—an indemnity against the happening of a contingent event. The inquiry still re-

mains whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon the exportation itself.

The answer must be found in the actual course of trade; for exportation is a trade movement and the exigencies of trade determine what is essential to the process of exporting. The avails of exports are usually obtained by drawing bills against the goods; these drafts must be accompanied by the bills of lading and policies or certificates of insurance. It is true that the bills of lading represent the goods, but the business of exporting requires not only the contract of carriage but appropriate provision for indemnity against marine risks during the voyage. The policy of insurance is universally recognized as one of the ordinary 'shipping documents.' Thus, when payment is to be made in exchange for such documents, they are held to include not only a proper bill of lading but also 'a policy of insurance for the proper amount.' *Tamvaco* v. *Lucas*, 1 B. & S. 185, 197, 206. It is not sufficient to tender the bill of lading without the policy. Benjamin on Sales, § 590, note; *Hickox* v. *Adams*, 34 L. T. N. S. 404. The requirements of exportation are reflected in the familiar 'C. I. F.' contract (that is, at a price to cover cost, insurance, and freight), which has 'its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in *Ireland* v. *Livingston*' (L. R. 5 H. L. 395, 406). *Ströms Bruks Aktie Bolag* v. *Hutchison* (1905) A. C., 515, 528. See also *Mee* v. *McNider*, 109 N. Y. 500. It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis. In illustration of this, the appellant appropriately directs

our attention to the recent action of Congress in establishing the War Risk Insurance Bureau, by which the Government itself undertakes to supply insurance against war risks in order to protect exports from the burden of excessive rates. Act of September 2, 1914, c. 293, 38 Stat. 711. In the report of the Committee of the House on Interstate and Foreign Commerce recommending the passage of the bill as an emergency measure, reference is made to the fact that other nations were insuring the vessels and cargoes under their respective flags against war risks. (House Reports, 63d Cong. 2d Sess., Report No. 1112.) The bill itself recites that the foreign commerce of the United States 'is now greatly impeded and endangered' through the lack of such provision, and that it is deemed 'necessary and expedient that the United States shall temporarily provide for the export shipping trade adequate facilities for the insurance of its commerce against the risks of war.' This is a very clear recognition of the fact that proper insurance during the voyage is one of the necessities of exportation. The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process.

For these reasons, we must conclude that, under the established rule of construction, the tax as laid in the present case was within the constitutional prohibition. *Fairbank* v. *United States*, 181 U. S. 283; *United States* v. *Hvoslef*, *ante*, p. 1.

Judgment reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.